U.S. Citizenship and Immigration Services

Non-Precedent Decision of the Administrative Appeals Office

In Re: 33908198

Date: OCT. 1, 2024

Appeal of Texas Service Center Decision

Form I-140, Immigrant Petition for Alien Workers (Extraordinary Ability)

The Petitioner seeks classification as an individual of extraordinary ability in athletics. *See* Immigration and Nationality Act (the Act) section 203(b)(1)(A), 8 U.S.C. § 1153(b)(1)(A). This first preference classification makes immigrant visas available to those who can demonstrate their extraordinary ability through sustained national or international acclaim and whose achievements have been recognized in their field through extensive documentation.

The Director of the Texas Service Center denied the petition, concluding the Petitioner did not establish he satisfied at least three of the initial evidentiary criteria. The matter is now before us on appeal.

The Petitioner bears the burden of proof to demonstrate eligibility by a preponderance of the evidence. *Matter of Chawathe*, 25 I&N Dec. 369, 375-76 (AAO 2010). We review the questions in this matter de novo. *Matter of Christo's, Inc.*, 26 I&N Dec. 537, 537 n.2 (AAO 2015). Upon de novo review, we will dismiss the appeal.

I. LAW

Section 203(b)(1)(A) of the Act makes immigrant visas available to individuals with extraordinary ability in the sciences, arts, education, business, or athletics which has been demonstrated by sustained national or international acclaim and whose achievements have been recognized in the field through extensive documentation, provided that the individual seeks to enter the United States to continue work in the area of extraordinary ability, and the individual's entry into the United States will substantially benefit prospectively the United States.

The term "extraordinary ability" refers only to those individuals in "that small percentage who have risen to the very top of the field of endeavor." 8 C.F.R. § 204.5(h)(2). The implementing regulation at 8 C.F.R. § 204.5(h)(3) sets forth a multi-part analysis. First, a petitioner can demonstrate sustained acclaim and the recognition of achievements in the field through a one-time achievement (that is, a major, internationally recognized award) or qualifying documentation that meets at least three of the ten categories listed at 8 C.F.R. § 204.5(h)(3)(i) – (x) (including items such as awards, published material in certain media, and scholarly articles).

Where a petitioner meets these initial evidence requirements, we then consider the totality of the material provided in a final merits determination and assess whether the record shows sustained national or international acclaim and demonstrates that the individual is among the small percentage at the very top of the field of endeavor. *See Kazarian v. USCIS*, 596 F.3d 1115 (9th Cir. 2010) (discussing a two-part review where the documentation is first counted and then, if fulfilling the required number of criteria, considered in the context of a final merits determination); *see also Visinscaia v. Beers*, 4 F. Supp. 3d 126, 131-32 (D.D.C. 2013); *Rijal v. USCIS*, 772 F. Supp. 2d 1339 (W.D. Wash. 2011).

II. ANALYSIS

In Parts 5 and 6 of the Form I-140, under "Additional Information About the Petitioner" and "Basic Information About the Proposed Employment," the Petitioner listed his "Occupation" as "Aquatic Coach – Instructor" and his "Job Title" as "Head Coach – Instructor." Because the Petitioner has not indicated or established receipt of a major, internationally recognized award, he must satisfy at least three of the alternate regulatory criteria at 8 C.F.R. § 204.5(h)(3)(i)-(x). In response to the Director's request for evidence (RFE), the Petitioner claimed to have satisfied the membership criterion at 8 C.F.R. § 204.5(h)(3)(ii), the published material criterion at 8 C.F.R. § 204.5(h)(3)(iii), the original contributions of major significance criterion at 8 C.F.R. § 204.5(h)(3)(v), the leading or critical role criterion at 8 C.F.R. § 204.5(h)(3)(viii), the high salary criterion at 8 C.F.R. § 204.5(h)(3)(ix), and the commercial successes in the performing arts criterion at 8 C.F.R. § 204.5(h)(3)(x). In denying the petition, the Director determined the Petitioner did not fulfill any of them. The Director stated that the Petitioner did not make it clear which evidence should be reviewed for each of the claimed criteria.[1]

On appeal, the Petitioner maintains that he meets the aforementioned criteria at 8 C.F.R. § 204.5(h)(3)(ii), (iii), (v), (viii), (ix), and (x). He further states: "[I]f the above standards don't readily apply to the alien's occupation, the alien may submit comparable evidence to establish the alien's eligibility. Through this new filing with new fee, the record will show that at least three of the requirements above have been directly met or with comparable evidence now introduced." The regulation at 8 C.F.R. § 204.5(h)(4) provides petitioners the opportunity to submit comparable evidence to establish eligibility, if it is determined that the evidentiary criteria described in the regulations do not readily apply to a petitioner's occupation. The Petitioner's appeal brief, however, does not offer arguments indicating which of the regulatory criteria are not readily applicable to his occupation. Nor has he demonstrated which of his "evidence now introduced" is truly comparable to any specific evidentiary criterion listed at 8 C.F.R. § 204.5(h)(3).

> *Documentation of the alien's membership in associations in the field for which classification is sought, which require outstanding achievements of their members, as judged by recognized national or international experts in their disciplines or fields.* 8 C.F.R. § 204.5(h)(3)(ii).

[1] The Director explained "[t]here are no bookmarks, clips, tabs, annotations that would allow USCIS to carefully review the evidence to determine if the Petitioner satisfied the requirements for each criterion. USCIS may not assume which evidence goes where and which evidence should be evaluated for a particular criterion."

The Petitioner's appeal brief states that he is a former [redacted] swim team member, but it does not point to evidence in the record demonstrating that this organization requires outstanding achievements in the field, as judged by recognized national or international experts. In addition, the "field for which classification is sought" in this case is coaching and instruction. The Petitioner has not shown that the [redacted] swim team is a coaching association. For these reasons, the Petitioner has not established he meets this criterion.

> *Published material about the alien in professional or major trade publications or other major media, relating to the alien's work in the field for which classification is sought. Such evidence shall include the title, date, and author of the material, and any necessary translation.* 8 C.F.R. § 204.5(h)(3)(iii).

The Petitioner provided articles relating to his accomplishments as a competitive swimmer in *SwimSwam* and *Best Swimming*. The "field for which classification is sought" in this case, however, is coaching and instruction. The Petitioner has not shown that his competitive swimming accomplishments relate to his work as a coach or an instructor. Further, the Petitioner has not presented *SwimSwam* and *Best Swimming*'s circulation or readership information relative to other publications indicating that they rise to the level of major trade publications or other major media. Accordingly, the Petitioner has not established that he meets this criterion.

> *Evidence of the alien's original scientific, scholarly, artistic, athletic, or business-related contributions of major significance in the field.* 8 C.F.R. § 204.5(h)(3)(v)

In order to satisfy the regulation at 8 C.F.R. § 204.5(h)(3)(v), a petitioner must establish that not only has he made original contributions, but that they have been of major significance in the field.[2]

In his appeal brief, the Petitioner does not identify his original athletic-related contributions of major significance in the field. He mentions "letters from experts in the field," but does not point to any specific letter or explain how it shows that he made original contributions of major significance in the field. For example, the Petitioner presented a letter from [redacted] President, discussing the Petitioner's achievements as a competitive swimmer such as a gold medal at the [redacted] in the 400-meter Freestyle Mix Relay." This letter, however, does not indicate that the Petitioner's original work has influenced the field in a substantial way or otherwise constitutes an original contribution of major significance in his field. Nor does Mr. [redacted] letter offer specific examples of how the Petitioner's coaching has affected his sport to the extent that it is of major significance in the field. The Petitioner's references do not offer sufficiently detailed information, nor does the record include adequate corroborating documentation, to show the nature of specific "original contributions" that the Petitioner has made to the field that have been considered to be of major significance.

In this case, the Petitioner has not demonstrated that his specific work rises to the level of original contributions of major significance in the field. Courts have routinely affirmed our decisions concluding that 8 C.F.R. § 204.5(h)(3)(v) "requires substantial influence beyond one's employers, clients, or customers." *Strategati, LLC v. Sessions*, 2019 WL 2330181, at *6 (S.D. Cal. May 31, 2019)

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[2] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).

(upholding an agency decision that held "[a] patent is not necessarily evidence of a track record of success with some degree of influence over the field as a whole."); *see also Amin v. Mayorkas*, 24 F.4th 383, 394 (5th Cir. 2022) (upholding agency decision that held evidence insufficient "because it did not show widespread replication of [the petitioner's invention]"). Here, the Petitioner has not shown that his original work has affected his field at a level commensurate with contributions of major significance in the field. He therefore has not established that he meets this criterion.

> *Evidence that the alien has performed in a leading or critical role for organizations or establishments that have a distinguished reputation.* 8 C.F.R. § 204.5(h)(3)(viii).

To qualify under this criterion, a petitioner must show that they performed in a leading or critical role for an organization, establishment, or a division or department of an organization or establishment. For a leading role, USCIS looks at whether the evidence establishes that the person is (or was) a leader within the organization or establishment or a division or department thereof.[3] A title, with appropriate matching duties, can help to establish that a role is (or was), in fact, leading.[4] For a critical role, USCIS looks at whether the evidence establishes that the person has contributed in a way that is of significant importance to the outcome of the organization or establishment's activities or those of a division or department of the organization or establishment.[5] A petitioner must also demonstrate that the organization or establishment, or the department or division for which they hold or held a leading or critical role, has a distinguished reputation.[6] Merriam-Webster's online dictionary defines "distinguished" as "marked by eminence, distinction, or excellence" or "befitting an eminent person."[7]

The Petitioner claims on appeal that he has performed in a "leading role" for organizations that have a distinguished reputation, but he does not identify any specific organization. While the Petitioner has competed as a swimmer for the [redacted] team and coached for [redacted] he does not point to evidence demonstrating that these positions were leading roles. For example, the Petitioner's employment agreement with [redacted] indicates that he reports to "the Head Coach and Board of Directors." The Petitioner, however, has not shown that his coaching position at [redacted] is a leading role. Nor does the Petitioner's appeal brief identify specific evidence in the record showing that the [redacted] swim team and [redacted] have a distinguished reputation. For these reasons, the Petitioner has not established that he meets this criterion.

> *Evidence that the alien has commanded a high salary or other significantly high remuneration for services, in relation to others in the field.* 8 C.F.R. § 204.5(h)(3)(ix).

For this criterion, USCIS determines whether the person's salary or remuneration is high relative to the compensation paid to others working in the field.[8] The Petitioner's employment agreement with [redacted] states that he "shall be paid a base salary of $30,000.00 less applicable withholding and payroll taxes. . . . You are eligible for a fully discretionary performance bonus to be

[3] *See generally* 6 *USCIS Policy Manual*, *supra*, at F.2(B)(1).
[4] *Id.*
[5] *Id.*
[6] *Id.*
[7] *Id.*
[8] *See generally* 6 USCIS Policy Manual, *supra*, at F.2(B)(1).

decided in the sole discretion of the Board of Directors with such bonus in no event in excess of up to 5% of base salary." In addition, the Petitioner submitted his 2023 U.S. Individual Income Tax Return showing total income of $40,951.00, but he has not provided evidence showing that his salary or remuneration is high relative to the compensation paid to other swim coaches.

To meet this criterion, the Petitioner must present evidence showing that he has earned a high salary or significantly high remuneration in comparison with those performing similar services in the field. *See Matter of Price*, 20 I&N Dec. 953, 954 (Assoc. Comm'r 1994) (considering a professional golfer's earnings versus other PGA Tour golfers); *see also Skokos v. U.S. Dept. of Homeland Sec.*, 420 F. App'x 712, 713-14 (9th Cir. 2011) (finding salary information for those performing lesser duties is not a comparison to others in the field); *Grimson v. INS*, 934 F. Supp. 965, 968 (N.D. Ill. 1996) (considering NHL enforcer's salary versus other NHL enforcers); *Muni v. INS*, 891 F. Supp. 440, 444-45 (N. D. Ill. 1995) (comparing salary of NHL defensive player to salary of other NHL defensemen). Here, the Petitioner has not established that he has commanded a high salary or other significantly high remuneration for services in relation to others in the field. Accordingly, he has not established that he fulfills this criterion.

> *Evidence of commercial successes in the performing arts, as shown by box office receipts or record, cassette, compact disk or video sales.* 8 C.F.R. § 204.5(h)(3)(x).

This criterion focuses on volume of sales and box office receipts as a measure of a petitioner's commercial success in the performing arts. The Petitioner's field, however, is not in the performing arts. Without evidence of sales or box office receipts demonstrating his commercial success in the performing arts, the Petitioner has not established that he satisfies this criterion.

III. O-1 NONIMMIGRANT STATUS

The record reflects that in August 2021 the Petitioner received O-1 status, a classification reserved for nonimmigrants of extraordinary ability. Although USCIS has approved at least one O-1 nonimmigrant visa petition filed on behalf of the Petitioner, this approval does not preclude USCIS from denying an immigrant visa petition which is adjudicated based on a different standard – statute, regulations, and case law. Many Form I-140 immigrant petitions are denied after USCIS approves nonimmigrant petitions. *See, e.g., Sunlift Int'l v. Mayorkas, et al.*, 2021 WL 3111627 (N.D. Cal. 2021); *Q Data Consulting, Inc. v. INS*, 293 F. Supp. 2d 25 (D.D.C. 2003); *IKEA US v. US Dept. of Justice*, 48 F. Supp. 2d 22 (D.D.C. 1999); *Fedin Bros. Co., Ltd. v. Sava*, 724 F. Supp. at 1108, *aff'd*, 905 F. 2d at 41. Furthermore, our authority over the USCIS service centers, the office adjudicating the nonimmigrant visa petition, is comparable to the relationship between a court of appeals and a district court. Even if a service center director has approved a nonimmigrant petition on behalf of an individual, we are not bound to follow that finding in the adjudication of another immigration petition. *See, e.g., La. Philharmonic Orchestra v. INS*, 248 F.3d 1139 (5th Cir. 2001) (per curiam). Nor are we required to approve applications or petitions where eligibility has not been demonstrated merely because of prior approvals that may have been erroneous. *See Matter of Church Scientology Int'l*, 19 I&N Dec. 593, 597 (Comm'r 1988); *see also Constr. & Design Co. v. Bureau of Citizenship & Immigr. Servs.*, 2008 WL 2074097 *5 (N.D. Ill. May 14, 2008) (describing as "prudent" that the AAO "assess each application on its own, rather than rubber stamping applications merely because of prior approvals"),

aff'd sub nom. Constr. & Design Co. v. U.S. Citizenship & Immigr. Servs., 563 F.3d 593 (7th Cir. 2009).

IV. CONCLUSION

The Petitioner has not established he satisfies the criteria relating to memberships, published material, original contributions of major significance, leading or critical role, high salary, or commercial successes in the performing arts. Because the Petitioner's inability to meet three of the initial criteria is dispositive of his appeal, we need not provide the type of final merits determination referenced in *Kazarian*, 596 F.3d at 1119-20. We therefore reserve this issue.[9]

Nevertheless, we have reviewed the record in the aggregate, concluding it does not support a conclusion that the Petitioner has established the acclaim and recognition required for the classification sought. The Petitioner seeks a highly restrictive visa classification, intended for individuals already at the top of their respective fields, rather than those progressing toward the top. *Matter of Price*, 20 I&N Dec. at 954 (Assoc. Comm'r 1994) (concluding that even major league level athletes do not automatically meet the statutory standards for classification as an individual of "extraordinary ability,"); *Visinscaia*, 4 F. Supp. 3d at 131 (internal quotation marks omitted) (finding that the extraordinary ability designation is "extremely restrictive by design,"); *Hamal v. Dep't of Homeland Sec. (Hamal II)*, No. 19-cv-2534, 2021 WL 2338316, at *5 (D.D.C. June 8, 2021), *aff'd*, 2023 WL 1156801 (D.C. Cir. Jan. 31, 2023) (determining that EB-1 visas are "reserved for a very small percentage of prospective immigrants"). *See also Hamal v. Dep't of Homeland Sec. (Hamal I)*, No. 19-cv-2534, 2020 WL 2934954, at *1 (D.D.C. June 3, 2020) (citing *Kazarian,* 596 at 1122 (upholding denial of petition of a published theoretical physicist specializing in non-Einsteinian theories of gravitation) (stating that "[c]ourts have found that even highly accomplished individuals fail to win this designation")); *Lee v. Ziglar*, 237 F. Supp. 2d 914, 918 (N.D. Ill. 2002) (finding that "arguably one of the most famous baseball players in Korean history" did not qualify for visa as a baseball coach). Here, the Petitioner has not shown the significance of his work is indicative of the required sustained national or international acclaim or it is consistent with a "career of acclaimed work in the field" as contemplated by Congress. H.R. Rep. No. 101-723, 59 (Sept. 19, 1990); *see also* section 203(b)(1)(A) of the Act. Moreover, the record does not otherwise demonstrate the Petitioner has garnered national or international acclaim in the field, and he is one of the small percentage who has risen to the very top of the field of endeavor. *See* section 203(b)(1)(A) of the Act and 8 C.F.R. § 204.5(h)(2). The record does not contain sufficient evidence establishing the Petitioner among the upper echelon in his field.

For the reasons discussed above, the Petitioner has not demonstrated eligibility as an individual of extraordinary ability. The appeal will be dismissed for the above stated reasons, with each considered as an independent and alternate basis for the decision.

ORDER: The appeal is dismissed.

[9] *See INS v. Bagamasbad*, 429 U.S. 24, 25 (1976) ("courts and agencies are not required to make findings on issues the decision of which is unnecessary to the results they reach"); *see also Matter of L-A-C-*, 26 I&N Dec. 516, 526 n.7 (BIA 2015) (declining to reach alternative issues on appeal where an applicant is otherwise ineligible).